

Comments on the Draft Criminal Procedure (Jersey) Law 201

From Sir Christopher Pitchers¹

1. I welcome the general reform of criminal procedure which is proposed. My specific comments are below. I must accept that the detailed comments would more usefully have been provided at the earlier consultation stage but I was not then aware of the proposals.
2. **Art 50: sentencing where the facts are in dispute.** This article seeks to deal with a real practical problem. After a jury trial, sentence must be adjourned to the Inferior or Superior Number as the case may be. The jurors passing sentence will not have heard the evidence at trial so cannot themselves form a view on any issue of relevance to sentence which is based on that evidence and which has not been determined by the jury's verdict. The trial judge will have formed such a view. Defence and prosecution alike need to know what his view is because the jurors would be bound to follow the Bailiff's view where it is based on evidence heard at the trial. That view will not be limited to facts but will include issues of importance to the sentencing process which will not have been decided by the jury. It is sensible that that should be raised immediately after the verdict before adjournment for sentence.
3. To give some commonplace examples: if a man is convicted of grave and criminal assault, a verdict of guilty means that the jury was sure that he was the assailant and that he struck unlawful blows causing the injuries. It does not necessarily resolve a dispute as to whether the assailant used only his fist or also his feet. It does not involve a decision as to the extent that the provoking words which the defendant asserts, but the victim denies, were uttered before the attack. On these the Bailiff, having heard the evidence, can form a considered view. The sentencing jurors, not having heard the evidence, cannot.
4. It is often not a matter of fact but of judgment which needs resolution. For example, two defendants jointly charged are both convicted. One defendant wishes to argue that the other was the leader and he the follower. That may be important to sentence. The trial judge having seen the witnesses including the defendants may well have formed a view.
5. The wording of the draft needs some minor amendment. The draft says 'the defence disputes the facts upon which the defendant was found guilty'. Read literally this would include facts which have been determined by the jury's verdict but are still disputed. It

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also does not cover relevant matters which are not facts. I suggest the section should be amended to read something like 'the defence disputes facts or other matters which may be relevant to sentence and which have not been determined by the verdict of the jury.'

6. **Art 66(6)-(8) – reserve jurors.** When a similar proposal was mooted in England and Wales in 2013, it was described by one newspaper as 'the biggest change to the jury system in 800 years'². Although that may be considered as somewhat hyperbolic, it is right to regard this as a very major change to a cornerstone of the Jersey criminal justice system. Consideration of the proposal falls four-square within the terms of reference of the sub-panel: 'to examine the draft legislation in relation to best practice in other common law systems'. I have been unable to find out if such an examination took place before the draft Law was published. In the time available, I have only been able to do limited research of my own.
7. Provision for reserve or alternative jurors exists in a number of common law jurisdictions. Many of the US state jurisdictions provide for them. In Australia some states do and some do not. Reserve jurors were recommended for England and Wales by Lord Justice Auld in his Report in 2002³ but not brought into effect. A paper commissioned by him said:

“Given the expense of some long trials, even swearing in two alternates would be worthwhile. It is common practice to use alternates in the United States...In four Australian jurisdictions, up to six reserve jurors may be sworn in. This is not yet permissible in Canada, Scotland or New Zealand, nor in English law.”
8. Some jurisdictions have established commissions to examine the proposals. See, for example, a Report by the Victoria Law Commission which examines this whole question in detail ⁴. Section 5 of the Commission's Report provides a detailed and thoughtful discussion of the issues and also, in the footnotes, reference to some of the considerable literature on the subject from other common law jurisdictions. Care must, however, be taken in comparing other systems in that not only are there a number of different ways in which the provisions work but there are important differences in the extent to which reduction of numbers in the jury is permitted and the availability of majority verdicts. In the following paragraphs, I consider the questions which need to be asked.
9. **Is this change needed at all?** I agree with the objections of the Law Society succinctly expressed in paragraph 28 of their Response. The number of trials which have to be aborted because the jury has fallen below the permitted number is vanishingly small. In 43 years of practice as advocate and judge in England, I was never involved in a trial where that occurred. It is true that very long trials are much more common now than

² Daily Mirror: 10 November 2013

³ Review of the Criminal Courts of England and Wales 2001

⁴http://www.lawreform.vic.gov.au/sites/default/files/VLRC_Jury_Empanelment_Report.pdf

they were when I started but even so I would be amazed if discharge of a jury because their numbers had fallen too far was other than an exceedingly rare event in Jersey. Loss of one juror is fairly commonplace and two not unknown. Reserve jurors could be used to fill these vacancies but this is not the situation which this major proposal is designed to deal with.

10. Of course, retrials come an economic cost to the taxpayer and a personal cost to witnesses and defendants but the overwhelming majority of retrials are caused either by a jury disagreement or by some adverse event which forces the trial judge to discharge the whole jury which would include any reserves.
11. **Is the proposed change wrong in principle?** The draft Law provides that the reserve jurors who have not been needed will be discharged before the Bailiff sums up. Until that point they will have been full members of the jury, retiring with them during adjournments and meeting up before the court sits. The secrecy of the jury room means that we cannot know what discussion of the evidence takes place amongst them during the trial before retiring to consider their verdict. However, common sense surely dictates that after an important witness gives evidence some discussion will take place as to what they think of him or her. Powerful views may be expressed which may or may not later change in the light of the further evidence. Those views powerful or otherwise will be informed, and rightly so, by the opinions of all including the reserves.
12. Judges always warn the jury not to speak to anyone about the trial outside their own number. The reason, often expressly articulated to the jury, is that they decide the case only on what they have heard in court and that they, and they alone, have the responsibility to decide the verdicts in the case. In any system in which the unused reserve jurors are discharged, those verdicts may be informed by opinions expressed on the evidence by people other than the 12 who retire after the summing-up.
13. I must accept that this factor cannot have concerned those systems that allow for reserve jurors sufficiently to outweigh the perceived advantages of reserve jurors. However, it does concern me.
14. **In what cases should reserve jurors be sworn in?** The draft Law provides for reserve jurors automatically to be sworn in in any case which is likely to last more than 5 days. This, with great respect to the drafters, does not seem to me to be sensible. They will, on the most pessimistic view, only be needed in exceedingly rare cases. It would only be in a case blighted by extraordinary bad luck that lost more than three jurors for separate reasons in a case lasting several weeks. Swearing in reserve jurors is not a 'no cost' option. Their expenses have to be met and their employers will have to manage without them. A long case can cause great personal inconvenience to jurors. They are also likely to carry back to the community a negative message about jury service. The Victorian State Commission on Juries carried out some interesting research

into the feelings of unused alternative jurors and found high levels of disappointment and frustration among them at having been part of the jury and then not part of the decision making process⁵.

15. Different systems have different ways of determining when alternative or reserve jurors should be sworn. In my opinion, if this proposal is enacted, it should not be automatic. In any case of any length, it should open to the Bailiff of his own motion or on application by a party to direct that reserve jurors be sworn. It might be sensible for a Practice Direction to be issued setting out the criteria that will be applied.

16. **How are juror numbers to be reduced?** If the extra jurors are properly speaking reserves, they will presumably be told at the outset that they will only be required to be part of the final 12 in certain circumstances. Another system used in some jurisdictions is to swear all jurors in the same way and then conduct a ballot immediately before retirement to determine who shall make up the 12. My objections apply equally to both methods.

17. **Is there an alternative?** If it is felt that the danger of a retrial caused by the number of jurors falling too low needs dealing with, a better solution, in my opinion, is to make provision for extra jurors in long cases. There is no magic in the number 12 as is illustrated by the fact that Jersey allows, as do many jurisdictions, the number to fall below that figure. Allowing for a larger jury to be sworn in exceptional cases meets a number of the objections of principle and practice that I have outlined above.

18. Professor Penny Darbyshire, one of the authors of the paper submitted to Lord Justice Auld and referred to above said this in a lecture in 2014:

"The safest procedure for using alternates is to swear in, say, 14 jurors then use a ballot to select the final 12 at the pre-retirement stage. This, however, raises the problem that the discharged jurors have contributed to discussions throughout the trial in a decision for which they do not have final responsibility. This is obviated if the extra two simply remain in the jury so that on the very rare occasions where a judge sees fit to swear extra jurors and the jury remains intact, the verdict emanates from a jury of 14, enhancing its legitimacy. There is a large body of research on optimum group size for decision making and a group of 14 has benefits and drawbacks, as does a group of 12. The pros and cons of all

⁵ Paragraph 5.43 of the Report

“alternate juror” procedures have been thorough canvassed recently in Canada and New Zealand.”⁶

19. The Victoria Commission considered the pros and cons and the various practical issues which arise and concluded on balance that they should move from a system of alternative jurors to one of enlarged juries in long cases. This recommendation has, so far as I have been able to discover, not been put into law.
20. **Art 69 – the abolition of peremptory challenges.** This is opposed by the Law Society but it has, in my judgment, rightly been retained in the draft. There is wide scope for challenging a juror for cause. Careful steps are taken to ensure that no juror knows or is connected to a witness or other participant in a trial. If there is no objection which can be articulated to a person sitting as a juror in a particular case, why should the defence be able to challenge them?
21. Two small but very sensible changes:
 - a. **Art. 72(6):** the jury will now select one of their number to be foreman or forewoman. The requirement for the Bailiff immediately to nominate the foreman was inappropriate to the modern system.
 - b. **Art. 75(4):** any majority verdict will be announced by the foreman. Not only could the previous practice of each juror telling the Bailiff and greffier his or her verdict on each count separately take time⁷ but it also could be argued to be a breach of the normally sacrosanct secrecy of the jury room.
22. **Art. 79 (8) and (9): retrial after 'hung' jury.** I support the proposal that there can be a further trial after the jury have failed to agree. The Article does not specify how many such retrials can take place. There is no magic figure and the limit would, in theory, only be set by the Bailiff's power to rule that a further trial would be an abuse of process. In England and Wales, the convention, and it is only a convention, has always been that if the retrial results in a second 'hung' jury, the prosecution does not seek a third trial and a verdict of not guilty is entered. This, of course, only applies where the jury have been discharged because they cannot agree not where they have been discharged without reaching the stage of considering their verdicts.
23. Two trials seem a fair compromise. If the prosecution has failed to convince a sufficient majority of two separate juries it can certainly be argued that they have failed to produce a sufficiently compelling case. There is probably no need for this principle to be enshrined in law. It might be sensible for the Attorney-General to set out what his policy will be in relation to retrials after a jury have disagreed.

⁶ Jury Reform in England & Wales – Unfinished Business 2014

⁷ 45 minutes in one case that I tried.

24. One point of detail. Art. 79(9) makes provision for a delay of seven days for the A-G to decide whether to proceed again or not. The Law Society oppose this. The provision is sound. Although it will often be the case that the A-G can make an immediate decision, there will be cases where he will need to take time to consider the public interest in proceeding again. For example, the complainant may need to be asked his or her view about giving evidence again or, if the jury have convicted of some but not all the counts on the indictment, it may be a finely balanced decision as to whether a retrial is justified.
25. **Art 83(3): non-disclosure in the public interest.** Although it is probably implicit in this sub-paragraph, it should be made clear that if the prosecution wish to withhold otherwise disclosable material under this article, they cannot simply decide to do so and say nothing about it. They must make an ex parte application to the Bailiff as occurs with material in respect of which PII is claimed.
26. **Art. 84/85/86 - Defence statements.** These provisions have, I think, been taken more or less verbatim from the English legislation. There is a good argument for requiring greater openness from the defence. However, the English rules as to defence statements exist in the context of a procedural regime where the right to silence when questioned by the police under caution and the right to remain silent at court are qualified. Adverse inferences may be drawn in appropriate circumstances. Detailed defence statements sit much more comfortably in such a regime. Although it should be noted that Alibi Notices requiring details of any alibi defence to be run including names and addresses of supporting witnesses were introduced in England and Wales when the right to remain silent both at the police station and at court was unqualified.
27. I support the general principle of requiring the defence to be more open. However, I have sympathy with the argument that the proposed provisions of a detailed statement of the defence case including defence witnesses introduce in effect qualifications to the right of silence by the back door. As the Law Society and Advocate Jowitt say in their submissions, at least there should be full debate. Were these draft Articles proposed after an overall consideration of the issues in this area?

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